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March 12, 2001

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 - CC Docket No. 96-98

Dear Ms. Salas,

On March 12, 2001, the attached letter was sent to Dorothy Attwood, Chief of the Common Carrier Bureau, regarding the provision of the unbundled local switching element.

Pursuant to Section 1.1206(a)(1) of the Commission's rules, and original and one copy of this letter are being submitted to the Office of the Secretary. Please associate this notification with the record in the proceeding indicated above.

If you have any questions regarding this matter, please call me at (202) 463-5293.

Sincerely,

W. Scott Randolph

cc: Glenn Reynolds
Michelle Carey
Jon Reel

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March 12, 2001

EX PARTE

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW – Room 5-C450
Washington, DC 20554

Re: Petitions for Reconsideration of the Third Report and Order,
CC Docket 96-98

Dear Ms. Attwood:

The developments in the market since this remand proceeding started make it ever more clear that the Commission should eliminate, or at a minimum significantly limit, the obligation to provide unbundled switching.

First, competing carriers have deployed switches in massive and growing numbers. In Verizon's service area alone, there now are over 600 competitive voice switches. Nationwide, according to the CLEC trade association, there are at least 1,000 competitive voice switches -- up from roughly 700 a year ago -- and another 2,000 competitive data switches (that also could be used to provide voice service). *See* Att. A (growth in CLEC switch deployment).

Second, competing carriers are using their switches to serve ever larger numbers of customers of all types. While competitors focused initially on serving more lucrative business customers, they now serve large numbers of residential customers as well. For example, in just three of the states served by Verizon, competing carriers already serve some *two and a quarter million lines using their own switches, including close to 300,000 known residential lines*. *See* Att. B (facilities-based lines by state). In New York, competing carriers now serve approximately 1.2 million lines using their own switches, including approximately 55,000 known residential lines. In Massachusetts, competing carriers now serve 555,000 lines using their own switches, including approximately 150,000 known residential lines. And in Pennsylvania, competing carriers now serve approximately 450,000 lines using their own switches, including approximately 67,000 known residential lines. Of course, these are just the customers that competing carriers already *serve* using their own switches in these three states; they obviously *offer* service to far more. For example, AT&T promotes its "premium local" "digital telephone service" and lists 97 different towns in Massachusetts alone where it offers service to single and dual family residences. *See*

http://www.mediaone.com/countrywide/avail/telephone/telephone.htm (and connecting pages).

Third, the proliferation in the use of competitive switching is geographically widespread. Competing carriers now serve customers using competitive switches in approximately two thirds of the MSAs in Verizon's service area, and are doing so in urban, suburban and rural areas. For example, in each of the three states cited above (New York, Massachusetts and Pennsylvania), competing carriers are using their own switches to serve customers in every area code in the state. *See* Att. C (distribution of facilities-based lines by area code).

As these straight-forward facts demonstrate, not only are alternative sources of switching available outside of Verizon's network, but competing carriers *already are using these alternatives* to serve large and rapidly growing numbers of customers. Under these circumstances, competing carriers would not be impaired if they did not have access to unbundled switching. As Chairman Powell noted at the time of the last order, the then-available "evidence of CLEC switch deployment strongly suggests that CLECs are not significantly impaired without access to unbundled switching, both in areas in which CLECs have deployed switches and in areas in which they have not done so." 15 FCC Rcd 3696, 3927 (1999). Today, this is all the more true given the even broader deployment and more widespread use of competitive switching in the time since the last order. Indeed, as a number of facilities-based carriers have pointed out, retaining a broad unbundled switching requirement such as the one currently in place would undermine the investment they have made in competing facilities and would be affirmatively harmful to the continuing growth of long-lasting facilities-based competition.

We understand that the Bureau currently is focused on a proposal by Allegiance, a facilities-based CLEC that provides service exclusively to business customers, to eliminate the requirement to provide unbundled switching for use to serve *business* customers. As the facts outlined above make clear, the Commission unquestionably should do so promptly.

But as the facts outlined above also make clear, eliminating the requirement for business customers is only a first step. Under the standards articulated by the Supreme Court, the requirement to provide unbundled switching also should be eliminated for at least some (and ultimately all) residential customers. Ideally, the Commission's initial reconsideration order would adopt criteria for eliminating the requirement to provide unbundled switching to serve residential customers as well. If doing so would delay an order addressing business customers, however, we urge the Commission to release its initial order now but keep the current proceeding open in order to determine the circumstances under which unbundled switching need not be provided to serve residential customers. Likewise, the Commission should continue to reconsider whether other elements, such as high capacity transport and dark fiber, satisfy the statutory unbundling standard in light of the similarly widespread deployment and use of competitive fiber (briefly summarized below) since the Commission's original order.

In either event, however, the Commission should eliminate the requirement to provide unbundled switching to serve business customers, and should do so without imposing a test based on performance standards or other conditions.

The Commission should not use performance measures or standards to determine whether switching satisfies the statutory standard. Some parties have suggested that the Commission should adopt a test that uses performance standards to determine whether other carriers are impaired if they do not have access to unbundled switching. It should not.

In the UNE Remand Order (¶ 27), the Commission recognized that any tests used to determine whether carriers would be impaired without access to a particular element must both "provide certainty in the marketplace" and be "administratively practical to apply." Injecting performance measures or standards into such a test would do neither. Instead, it would merely convert a bright line test into one that is subject to perpetual litigation and that invites gaming. Indeed, the use of similar measures and standards in section 271 proceedings has generated considerable dispute and led to extensive litigation over everything from the definition of the underlying measures, to the inputs that go into calculating the measures, to the proper interpretation of the outputs of the measures. And as that experience has shown, the results produced by those measures frequently are affected by the chosen business practices of the CLECs themselves rather than the performance of the incumbents.[1] Consequently, as Time Warner recognized in its February 6 *ex parte*, performance-based standards would only increase uncertainty and undermine business planning and investment decisions by competing carriers.

Moreover, performance measures or standards for *loops* are irrelevant to the question of whether unbundled *switching* is required. These measures and standards were not designed for, and were not intended to be used as, a national test for determining whether and under what circumstances some *other* element (such as switching) should be made available on an unbundled basis. Rather, performance measures and standards have been developed on a local basis as a way to evaluate whether a given element that remains subject to an unbundling requirement (such as a loop) is provided on non-discriminatory terms. And these measures and standards typically vary considerably from state to state based on unique local circumstances, even for the same basic elements (such as "hot-cuts"). To the extent issues arise with respect to a carrier's performance in a given state, therefore, they can and should be addressed in that context. But regardless, as the facts outlined above and elsewhere in the record demonstrate, competing carriers already are successfully using their own switches on a massive scale and self-evidently are not impaired if unbundled switching is not available

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[1] *See SBC Kansas and Oklahoma 271 Order*, CC Docket No. 00-217, FCC 01-29, ¶¶ 31-32, 269 (rel. Jan. 22, 2001) ("Factors beyond a BOC's control, such as individual CLEC entry strategies for instance, might explain" low performance numbers); *Bell Atlantic New York 271 Order*, 15 FCC Rcd 3953 (1999), *SBC Texas 271 Order*, 15 FCC Rcd 18354 (2000).

At a minimum, the Commission should eliminate the requirement to provide unbundled switching to all business customers in MSAs with two or more competitive switches. As described above, competing carriers have now widely deployed competitive switches to serve customers in all types of areas. As Chairman Powell previously noted, this evidence of widespread deployment shows that competing carriers are not impaired without access to unbundled switching, either "in areas in which CLECs have deployed switches and in areas in which they have not done so." 15 FCC Rcd 3696, 3927 (1999). For precisely that reason, we believe that the correct result here is to eliminate the requirement to provide unbundled switching for all business customers regardless of their geographic location.

At a minimum, however, the Commission should eliminate the requirement to provide unbundled switching to business customers throughout any MSA with two or more competitive switches. As Allegiance explains, the presence of competing switches is not limited to the largest MSAs, let alone to particular rate zones within those MSAs. As a result, the Commission's current rules -- which limit the requirement to provide unbundled switching only in zone 1 offices in the largest MSAs -- are inconsistent with the facts on the ground and with the Act's unbundling standards.

The Commission's precedent supports evaluating competition on an MSA-wide (or wider) basis. In the context of its rules for obtaining pricing flexibility for special access, the Commission rejected claims that the competition test should be based on a smaller area than an entire MSA. *Access Charge Reform*, 5th Report and Order, 14 FCC Rcd 14221, ¶ 74 (1999). Moreover, in that case, the question was whether sufficient actual competition was present to justify removing services from price regulation. Here, the question is more limited; that is, whether competitors would be impaired if they chose to compete, without regard to whether they already are competing in a given location. As a result, the geographic scope of any limits on the requirement to provide unbundled switching should be no smaller than the MSA-wide scope of the Commission's existing Commission rules that recently were upheld. *WorldCom v. FCC*, 238 F.3d 449, 2001 U.S. App. LEXIS, at *32 (D.C. Cir. 2001) ("The FCC considered alternatives to MSA-wide relief and determined that, on balance, these alternatives would be less beneficial to consumers and regulated entities").[2]

As Allegiance points out, if the Commission adopts an MSA-based rule, it also should grandfather any zone 1 lines that are not subject to an unbundled switching requirement under current rules but would not be located in a qualifying MSA under any new rules. After all, given the significant increase in competitive switching, it would make no sense to expand the unbundled switching requirement to areas where it does not now apply.

The Commission should not, however, adopt additional requirements suggested by other parties. First, some parties suggest as one alternative that the Commission could adopt

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[2] Any MSA-based standard should use the same definition of MSAs (and non-MSA areas) as in the special access context. *Access Charge Reform*, 5th Report and Order at ¶¶ 24-25. Both carriers and Commission staff have a common understanding of these definitions, and using a consistent definition would reduce administrative burdens and avoid confusion.

a standard based on the size of the business customer to be served. As Allegiance recognizes, however, the record here demonstrates that small businesses already are being served by facilities-based CLECS. For example, in New York, the *majority* of lines served by competitors using their own switches and ported numbers are for small business or residence customers. *See, e.g.*, Verizon Sept. 27, 2000 *Ex Parte* from Scott Randolph to Magalie Salas, attachment at 5 (providing percentage of ported numbers for customers with less than 12 lines). Consequently, competing carriers are not impaired in their ability to serve business customers without access to unbundled switching, regardless of the size of the customer. As such, the requirement should be eliminated for all business customers.

Second, Allegiance suggests that the Commission could eliminate the requirement to provide unbundled switching only in MSAs with four or more competitive switches. Allegiance does not attempt to justify the need for so many switches except to refer to the *UNE Remand Order* where the Commission merely observed that competing carriers have deployed four or more switches in the vast majority of the top 50 MSAs. *See* 15 FCC Rcd 3696, ¶ 280 (1999). But Allegiance itself recognizes that the top 50 MSAs is an artificial limit, and that competing carriers are using their own switches to serve customers in MSAs outside the top 50. Indeed, as Chairman Powell has noted, the facts here strongly suggest that carriers would not be impaired even in areas where they have not yet deployed competitive switches at all. But if at least one carrier *has* deployed a competitive switch in a given area, the evidence is all the stronger that carriers are not impaired there. And even if the Commission were to require a second competing switch in order to avoid reliance on a potentially idiosyncratic competitor – there is no justification to go still further and require three or even four competing switches.

Third, while admitting that the presence of collocation is not necessary to avoid an unbundled switching requirement, Allegiance says that the Commission could nonetheless choose to impose such a requirement. But such an additional requirement makes no sense and is inconsistent with the Act. Where competitors are providing service in a given MSA with their own switch, how they are providing such service is irrelevant. Either they are using one of the ubiquitous collocation arrangements that already are in place (including some 12,000 collocation sites in Verizon's service area alone), in which case the collocation requirement is superfluous, or they are providing service through an independent network, in which case the collocation requirement is irrelevant. In either case, the presence of collocation does not provide an independent basis for determining whether a carrier is or is not impaired without access to unbundled switching.

The Commission may not condition its order a UNE requirement on the availability of Enhanced Extended Links ("EELs"). As Verizon demonstrated in its October 20th *ex parte* letter to you, the Commission neither can nor should condition its order here on a requirement to provide loop and transport combinations, sometimes referred to as enhanced extended links.

As an initial matter, the current state of the law is clear that the Commission may not require new combinations of unbundled elements. As the Eighth Circuit recently has reaffirmed:

> "Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall 'combine such elements.' It is not the duty of the ILECs to 'perform the functions necessary to combine unbundled network elements in any manner' as required by the FCC's rule. See 47 C.F.R. § 51.315(c). We reiterate what we said in our prior opinion: 'The Act does not require the incumbent LECs to do all the work.'" *Iowa Utilities Board v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000).

While the Supreme Court has agreed to review this question, that portion of the Eighth Circuit decision has not been stayed, and under the Hobbs Act continues to be binding on the Commission. 28 U.S.C. § 2342.

Even aside from this fact, moreover, if competing carriers would not be impaired without access to unbundled switching, that is the end of the matter. In light of the extensive evidence that competing carriers already are using their own switches to serve business (and other) customers – as Allegiance itself demonstrates they are – the Commission may not, consistent with the standards in the Act, impose additional requirements as a condition to eliminate an unwarranted unbundling requirement.

Indeed, the record here shows that such a requirement is simply unnecessary. In the debate you sponsored, there was sharp disagreement among the diverse parties on almost every issue relating to unbundled switching. The one issue on which there was consensus was that there was no need to continue the current EEL requirement. Even the PACE coalition, which consists of facilities-based carriers, recognized that there is "no real reason" to tie making an EEL available with limits on the unbundled switching obligation. *See* Transcript of Switch UNE Debate at 10, CC Dkt. No. 96-98 (Nov. 17, 2000). As you aptly summarized, "nobody in [the] room" supported "a continuing association with the EEL." *Id.* at 19.

That consensus is hardly surprising. The supposed reason for obtaining combinations of unbundled elements is to extend the reach of competitive switches without collocating. As noted above, however, collocation already is ubiquitous. For example, in Verizon's service territory alone, there are more than 12,000 collocation sites. As a result, the supposed need for combinations of unbundled elements as a way to avoid establishing collocation arrangements is illusory. And even if the availability of EELs might reduce the cost to extend the reach of competitive switches in some instances, that does not mean that competitive alternatives could not be available without them. As the Supreme Court has pointedly noted, the mere fact that the potential profit from a competing service might be reduced does not demonstrate that carriers are impaired in their ability to provide a competing service. *See AT&T v. Iowa Utilities Board*, 525 U.S. 366, 389-90 (1999).

Moreover, the Commission could not impose an EEL requirement without proof that competitors would be impaired without access both to the elements that make up an EEL as well as to the EEL combination itself. Yet, the type of high capacity facilities that make up

an EEL have been widely deployed by other providers. For example, competing carriers already have deployed more than 218,000 route miles of fiber, and the number of known buildings served by competing fiber increased from 793,000 at the end of 1999 to more than 1.1 million by the end of the third quarter of 2000.[3] In fact, incumbents and CLECs now obtain fiber from some of the same third party sources, such as Metromedia Fiber Network.[4] And the competitive alternatives continue to grow.[5] Under these circumstances, rather than expanding unbundling obligations to encompass EELs, the Commission instead should use the ongoing rulemaking in this docket to determine the circumstances under which the individual high capacity transport or loop elements no longer satisfy the statutory unbundling standards.

* * *

In sum, the deployment and use of competitive local switching is a success story that should be recognized and promoted by the Commission. As Allegiance and other similar carriers have made clear, however, a regulatory policy that forces them to compete with low-priced unbundled switching would undermine this robust competition. The Commission should establish a policy that, consistent with the Act, establishes a bright-line that would eliminate this requirement.

Sincerely,

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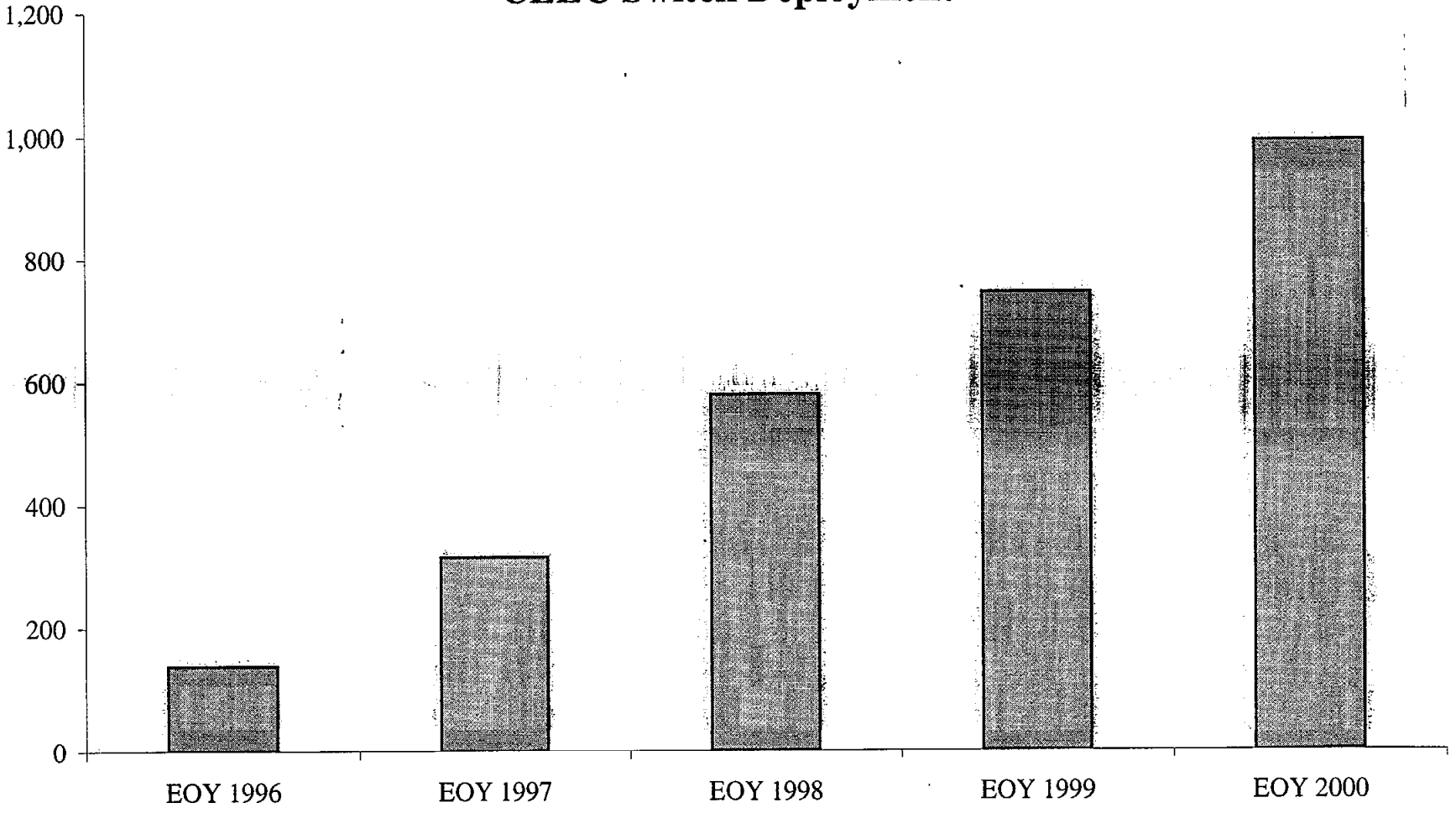
[3] *See* New Paradigm Resources Group, *CLEC Report 2001*, Ch.1 at Table 2 & Ch. 6 at Table 11 (13 ed. 2001).

[4] *See, e.g.*, J. Friedland, Robertson Stephens, Investext Rpt. No. 2144039, Metromedia Fiber Network: Initiating Coverage – Company Report at *1-2 (Apr. 25, 2000) ("MFN is the lowest cost provider of unmetered dark fiber. Given the favorable economics of leasing MFN fiber versus construction, we expect the majority of incumbent carriers, CLECs, IXCs, ISPs, ASPs, and large corporations with high bandwidth needs to lease MFN's dark fiber").

[5] *See, e.g.*, J. Friedland, Robertson Stephens, Investext Rpt. No. 2251231, Metromedia Fiber Network – Company Report at *3 (Aug. 8, 2000) ("Competition from providers of dark fiber is increasing," with "Level 3 as [MFN's] largest competitor in the metropolitan dark fiber market"); D. Piscitello, *EtherLECs-Competitors or Saviors?*, CLEC-Planet (Jan. 11, 2001), http://www.celc-planet.com/business/0012piscitello2.htm ("[T]he vast majority of metro dark fiber comes from other than incumbent LECs. Telseon, for example, has strategic relationships for dark fiber from Level(3) and MFN. Telseon, Yipes! and others also lease from municipalities, utilities and private companies").

ATTACHMENT A
CLEC Switch Deployment



Sources: New Paradigm Resources Group and Connecticut Research, *1997 Annual Report on Local Telecommunications Competition,* Ch. 1 at Table 2 (8th ed. 1997) (1996); New Paradigm Resources Group, *1999 CLEC Report* , Ch. 6 at Table 6 (10th ed. 1999) (1997, 1998); New Paradigm Resources Group, *CLEC Report 2001* , Ch. 6 at Table 6 (13th ed. 2001) (1999, 2000).

# of Switches installed		installed
139	EOY 1996	CLEC 1997 (8th ed.), Ch. 1 at Table 2
315	EOY 1997	CLEC 1999 (10th ed. 1999), Ch. 6 at Table 6
579	EOY 1998	CLEC 1999 (10th ed. 1999), Ch. 6 at Table 6
743	EOY 1999	CLEC 2001 (13th ed.), Ch. 6 at Table 6
991	EOY 2000	CLEC 2001 (13th ed.), Ch. 6 at Table 6

ATTACHMENT B

	New York	Massachusetts	Pennsylvania
Total CLEC Facilities-Based Lines (based on E911 listings)	1,219,000	555,000	453,000
CLEC Residential Facilities-Based Lines (based on directory listings)	55,000	143,000	67,000
New York: E911 data as of January 2001, directory listings data as of December 2000. *Massachusetts:* data as of January 2001. *Pennsylvania:* data as of October 2000. UNE Platform data were subtracted from facilities-based directory listings data to determine residential facilities-based lines.			

ATTACHMENT C - CLEC Facilities-Based Lines by Area Code